Translating Ideas

Ariane Grieser 2014-02-28T13:46:47

Picking up some of the threads of the current debate on this blog, I would like to focus on an aspect that to my mind is of crucial importance in the matter: the necessity of translation.

What I mean by that will hopefully become clear in the course of the following three steps:

First I would like to argue why and in what sense doctrinal scholarship is (or at least can be) at the very core of law. In a second step I would like to explain why – therefore and nevertheless – it needs interdisciplinarity and internationalization/ comparative legal studies. And finally I focus on one of the main conditions for a successful dialogue between these elements. All this flanked by referring to the report of the German Council of Science and Humanities and how it faces these three aspects.

I start – not surprisingly – with the first step: the value of legal doctrine

Legal doctrine is a mediator of will, it communicates normativity by being an interpreter between the abstract general norm(s) and the concrete particular case(s) with a – cum grano salis – clear and precise grammar (see also report p. 37) – and I would hold this even though I am well aware of its limits. By doing so, legal doctrine is also the common language in a dialog of legal science and legal practice, making the (smaller or larger) space of scientific reasoning more easily accessible to application and vice versa. Thus it also enriches the concept of equality of and before the law relating universal and general aspects of equal treatment to the diversities of every singular case/subject. Legal doctrine in so far also resembles the very idea of normativity as a link between mind and the world experienced, between an idea or will and its realization. “Its objects are legal texts that are both valid and intended to be applied” (report p. 35). The “normativity and decision-making function of legal scholarship” “has real and lasting effects on social life.” (report p. 32). Of course, this is true for all legal systems. Yet the conclusion that the German tradition draws from this is I think to a certain extent specific: “Only a methodically sound, consistent and coherent law adhering to justifiable principles can be applied by courts, administrative institutions, legal consultants and others.” (report p. 37). “The insights gained are brought together in a structured way and developed further in the doctrinal subjects, employing reasoning that must be internally consistent and coherent with other scholarly insights.” (report p. 33). So the German focus is on “the legal system in its entirety” (report p. 36) with the intention that the discipline as well as the legal system itself “remains unified” (report ibid.). I don’t mean to say that other legal traditions are unsystematic, I just think that Germans are inclined to a specific and strong idea demanding logical systems, which probably goes back to the German tradition of systematic philosophy (see for example Kant’s concept of the “architecture of reason” in the Critique of Pure Reason p. A 832/

B 860 as well as his idea of philosophy in general). As for German legal doctrine in particular I suppose (but I am not an expert in this) that it also originated from the Roman law tradition of German private law with influences by the so-called "Begriffsjurisprudenz". Anyway it is a cultural development (as Ralf Michaels' subtly differentiated post put it) not in the sense of an innate Volksgeist but rather in the sense of a tradition of ideas. This need neither stay exclusively German nor is it the solution to the world's legal problems or the winning concept in a competition for the best legal system. There are simply several differences to the logic of case law systems for example, which also become visible in the report, e.g. on p. 41: legal practice should not (by primarily relying on and relating to precedents) become a self- referential system in the sense that it no longer draws on the systematic, reflecting, organizing and critical sources of legal science, but that on the contrary the strongly integrative approach as well as the systematic entirety should be maintained. One may consider this system-fixation an obstacle to the freedom of legal reasoning – I personally rather think it a wing. Yet this does not mean that we should or do take legal doctrine for "wizardry" as Robert Howse felt tempted to call it. "Thou know'st we work by wit, and not by witchcraft" *(Othello II 3)*. In this sense, legal doctrine is simply an attempt to build a bridge between will and world by small scholarly steps.

I frankly admit that this is a description of the ideal. Nevertheless, in a regulative (asymptotic) sense and by and large, this ideal can work quite well I dare say. (Even though facing the one or other failure I sometimes feel inclined myself to drown the whole idea in black humor.) Hence I think one should not too easily part with or underestimate the German tradition of legal doctrine. I also believe that the state exam – twofold as the first is now, divided between state and universities – actually provides a good frame for this concept of legal doctrine since it even institutionally expresses the dialog between science and an administration linked to (state-) practice.

The problem about legal doctrine however is its tendency to stay a monologue and deal with its difficulties by merely talking to itself. But neither must nor need it be so, for doctrine cannot provide all relevant answers from within itself.

The need for interdisciplinarity, internationalization and comparative legal studies

And this leads to my second step: the (two main) reasons why this doctrine has to be amplified by other disciplines (be it philosophy, history, sociology, psychology, political or economic science etc. – I leave theory aside for the moment since one might argue that *legal* theory could be called "purely" legal although I would say that as a meta-science at least it's general structures are trans-legal) and internationalization/ comparative legal studies. So the reasons are:

First the (necessary) narrowness of legal doctrine and second its need for development.

Legal doctrine is not the ghost of a dead ancestor haunting the house of law – even though it is often mistaken for being so. It is a living language that needs adaption to its subjects. And these subjects have several dimensions that can be viewed from

several disciplinary perspectives and on the whole (i.e. in their n-dimensionality) only be seen by taking all of them into account. Other disciplines as well as other legal systems with their different concepts of law can not only be mirrors for reflection but may also provide solutions or at least important information for the solution of legal problems. To understand its own perspective and to reflectedly decide its own focus, legal scholarship needs the communication with other perspectives. The report of the council refers to this quite broadly.

Yet – one has to be well aware of the fact that this is a dialogue of different languages, which will always need translation (you absolutely do not have to be a disciple of Luhmann to see it that way). And this brings me to my third step:

One of the main conditions for a successful dialogue

The main danger in this field lies in mixing or rather blurring methods. The unreflected adoption of elements or reasoning from other disciplines or legal systems without minding their specific function or logic or role in their actual theoretic "environment" confuses legal reasoning as much as a reflected translation clears and enriches it. In this sense, what makes legal doctrine narrow and stubborn on the one hand could on the other hand be turned into an advantage: it actually forces to translation – hence, I believe, the increasing inclination to drop it, because translation taken seriously is quite demanding. Like in any ordinary translation one hast to deal with at least four possibilities:

1. an element/aspect can easily be translated (since there are functional equivalents or similar structures)

2. an element/aspect can be translated but only by slightly shifting/adapting its meaning/function

3. an element/aspect cannot be translated directly but

a) one can create a new word/ make new use of a concept or

b) one can adopt the foreign word/ concept in one's own language if the meaning is needed or useful.

4. an element/aspect cannot be translated at all because in one's own language (i.e. in a legal perspective) there is/can be no equivalent to the relevant aspect.

All these possibilities have to be reflected and challenged in every particular case before applying one of them.

Of course the translation-aspect is – although not always focused directly – always present (in publications, in the report and in this blog, see for the latter e.g. Michaela Haibronner's carefully observing post). So on the one hand I am surely taking owls to Athens (or coals to Newcastle – if anyone feels offended by the cultural dominance of ancient Greek proverbs). Yet on the other hand one can still – not generally but regularly – witness people at international and/or interdisciplinary conferences using the same word for completely different concepts without being aware of it (the word/

concept of “constitution” being one prominent example). Now this may decrease with a scholar’s expertise in several disciplines and/or legal orders (as Ralf Michaels suggested) – however, blurring of methods might not. On the contrary there are quite some examples even of brilliant scholars that tend to use their second subject as a magical answering tool for legal problems in the sense that the “actual” meaning of law is supposed to be economic, philosophical, sociological or whatever. To a certain extent, this is a necessary element of interdisciplinarity, but the limit lies I think at a level where it starts to erode the specific logic of law. Law is deeply linked to other matters but it is not driven by them – at least not as long as it is conscious of its own possibilities. This also makes, that its link to other matters is not a one way road but rather works also vice versa (see report p. 37: “As a result legal scholarship has a corrective function vis-à-vis the market, politics, morality and religion. Legal scholarship participates in a discourse on societal principles, such as justice, freedom, human dignity, and solidarity. It is not the only institution to engage with these topics, but it approaches these principles through the exceptional nature of the law, which is a force to be obeyed and applicable to all.” – Whether or not one would like to put a “Schranken-Schranke” to this (what sounds like an absolute) superiority claim, yet the (mutually interactive) autonomy of law remains). Moreover the interactions of law are at least as manifold as is its scope of (possible) aims, so there will always be a multitude of languages to be faced. If we want to avoid building a babel-tower we will always have to be carefully aware of the need for translation – in the double sense that we need to communicate with other perspectives and that we need to translate the conclusions from this communication into the (specific) language of law.

These caveats considered, how can a successful dialogue be achieved?

In this aspect, I must confess, parts of the report (especially its section B I) read slightly Hegelian, i.e. describe what legal scholarship *actually* “an sich” is and how its very concept embraces interdisciplinarity (e.g. p. 38 “Legal scholarship offers […]” pp – the German version is even a deal stronger: “hält […] beständig präsent” ibid. p. 34). I would agree, this may be the pure reason of the German concept of legal scholarship, but that does not mean that its reason is uno actu real. True, even a deficient realization is after all still a realization. However this interdisciplinarity is not yet real in a considerably sufficient sense at all (or rather, it very partly is but not in general) and the crucial question is whether it is going to become so. And I am not that much of a Hegelian as to believe in the self-fulfilling or rather self-enforcing power of the concept itself.

Still, one has to be fair, the report also sees the gaps between desiderata and reality, at least section B III (studying law) mirrors them by providing a branch of ideas how to promote interdisciplinarity, internationalization and comparative studies. I would not even see their role in the concept as subordinate to legal doctrine as Ralf Michaels does, although I am afraid it will be in the course of realization (proving the vows to foundational subjects once more to be mere lip service). Yet that need not be so. Although I am still sceptical whether the proposed “integration” (p. 60) into the classical doctrinal classes will work (not that it could not, but it demands a deal) some other ideas seem quite promising, among them a real and regular cooperation

with other faculties (p. 62) and the strengthening of comparative approaches also by visiting teachers from other legal systems (p. 63). These are no magical tools of course, but with some wit they might have a considerable positive effect. Still interdisciplinarity and internationalization will never be self-fulfilling. Especially we will always have to keep aware of the need for translation. Seminars with two teachers from different disciplines or legal orders might enhance this but will not do so automatically. At best we achieve a real dialogue that opens up a scope of ideas and enables us to reflectedly decide which of them we consider promising for our purpose. Whether and to what extent other disciplines or legal orders think our ideas apt or promising for their purpose is a decision they will have to make.

After all, it is a question of consciousness. Hence it could be achieved. The future has to prove whether it will be.

Anyway, if we understand the report in a Hegelian sense, we are sure to face an enlightened future. – Yet “wit depends on dilatory time”. *(Othello II 3)*

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